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No. 90-1728

In the Supreme Court of the United States

OCTOBER TERM, 1991

SALVATORE INGRATI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed plain error in failing to define the term "reasonable doubt" for the jury.

2. Whether the district court committed plain error in failing to include an instruction on the presumption of innocence in its final charge to the jury.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is unreported, but the judgment is noted at 928 F.2d 397 (Table). The opinion of the court of appeals in the related case of *United States* v. *Telesford* (Pet. App. 15a-22a) is also unreported, but the judgment is noted at 928 F.2d 398 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1991. The petition for a writ of certiorari was filed on May 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Delaware, petitioner was convicted on one count of conspiracy to distribute controlled substances, in violation of 21 U.S.C. 846, one count of distribution of heroin, in violation of 21 U.S.C. 841(a)(1), and one count of using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1). He was sentenced to concurrent terms of imprisonment of 260 months on the conspiracy and distribution counts, and to a consecutive term of 60 months' imprisonment on the firearm count. He was also sentenced to five years' supervised release. The court of appeals affirmed. Pet. App. 1a-14a.[1]

1. The evidence showed that in the summer of 1987, both the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) began investigations into the activities of Vincent Scotto, the operator of a pizzeria in Claymont, Delaware. Undercover agents let it be known to Scotto that they were interested in buying heroin, and Scotto introduced them to Nicola Lante as a source of heroin. Two undercover agents posing as drug customers made purchases of heroin and cocaine directly from Lante, as well as from Francesco Bellitti, Ignazio Lena, and Alexis Telesford. Gov't C.A. Br. 6-8.

The undercover agents never bought drugs directly from petitioner, but the evidence showed that he was involved

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[1] Petitioner was tried jointly with Alexis Telesford, whose conviction was affirmed in a separate opinion. Pet. App. 15a-22a. Other co-defendants—Ignazio Lena, Nicola Lante, Francesco Bellitti, Vincenzo Macri, Guiseppe Corso, and Cosimo Ingrati—all pleaded guilty to various drug offenses. Gov't C.A. Br. 2-5. Telesford, Lena, Lante, and Bellitti appealed their convictions and all were affirmed. See 928 F.2d 397, 398 (1991). No other appellant has joined in this petition.

in various distributions. On February 28, 1989, one of the agents gave a gym bag containing $105,000 to Lena. Lena left the agent with Bellitti and drove to Lena's residence. After half an hour, Lena left with the gym bag and drove to a diner, where surveillance agents saw petitioner get into Lena's car. Lena and petitioner drove off, followed by another car driven by petitioner's brother-in-law. The two cars parked next to each other for two minutes, and petitioner then left Lena's car and got into the other car. Lena went back to his apartment, came out with a plastic bag, and returned to the place where the undercover agent was waiting. He gave the agent the gym bag, which now contained 504.9 grams of 77% pure heroin in a plastic bag. Gov't C.A. Br. 17-18.

On July 13, 1989, after one of the undercover agents had requested a heroin sample from Lena and Bellitti, FBI surveillance agents saw and photographed Lena and Bellitti meeting with petitioner and Macri. Less than an hour later, Bellitti and Lena delivered a sample of heroin to the agent. Gov't C.A. Br. 20.

On July 18, 1989, FBI agents followed Lena as he carried out the delivery of more than one and one-quarter kilograms of heroin the undercover agent had agreed to buy. Bellitti and Lena met petitioner and Macri at a diner in Brooklyn. Lena then left in the car that the agent had left there by prearrangement. Lena was followed by two other vehicles, one driven by petitioner and Macri, and the other by petitioner's nephew, Cosimo Ingrati. The three vehicles were seen traveling from Brooklyn to a rest area on Interstate 95 in New Castle County, Delaware. There, surveillance agents watched as petitioner and Macri got into the back of the van that had been driven by Cosimo Ingrati. Petitioner emerged with a bag, walked over to the car driven by Lena, unlocked the trunk, and placed the bag inside.

Petitioner and Macri then went into the restaurant pavilion and spoke to Lena, who was waiting there with the agent. Lena and the agent went to the car Lena had driven and the two looked inside the trunk, where petitioner had placed the bag. Lena, Macri, petitioner, and Cosimo Ingrati were arrested shortly thereafter. The bag that petitioner had placed in the car trunk was found to contain 1,271 grams of 86% pure heroin. Gov't C.A. Br. 21-22.

A later inventory search of the car that petitioner had driven produced a loaded .45 caliber semi-automatic pistol under a child's car seat and blanket on the rear seat. The gun was positioned so that the driver of the vehicle could reach it. Gov't C.A. Br. 23.

2. On appeal, petitioner claimed that the district court had erred in failing to provide the jury with a definition of the term "reasonable doubt" and in failing to instruct the jury regarding the presumption of innocence. Petitioner had not objected at trial to either omission by the district court. The court of appeals relied on its determination, in Telesford's appeal, that the failure to define reasonable doubt and instruct the jury on the presumption of innocence did not constitute plain error. Pet. App. 3a. With respect to the omission of a definition of reasonable doubt, the court in *Telesford* had pointed out that the district court had made repeated references to the government's burden of proof beyond a reasonable doubt, and that both counsel for petitioner and counsel for Telesford had set forth a definition of reasonable doubt in closing arguments. *Id.* at 17a-20a. With respect to the failure to include a presumption of innocence instruction in the final charge to the jury, the court in *Telesford* explained that the trial court had twice given such an instruction following the empanelment and swearing of the jury. Other instructions, moreover, made it clear that the indictment was not evidence of anything,

that the defendant had no duty to call any witnesses or produce any evidence, and that the jury should rely only on the evidence presented in determining their verdicts. In addition, counsel for Telesford referred to the presumption of innocence in both his opening statement and closing argument, and the evidence against petitioner and Telesford was substantial. Pet. App. 3a, 20a-21a.[2]

ARGUMENT

1. Petitioner renews his contention (Pet. 8-13) that the district court erred in failing to define for the jury the concept of "reasonable doubt." Petitioner's claim does not warrant review.

As an initial matter, the court of appeals correctly determined that, in view of petitioner's failure to object to the reasonable doubt instruction at trial, he bears a particularly heavy burden in attempting to raise it for the first time on appeal. Pet. App. 4a, 16a-17a. See *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). Petitioner must establish that the omission constituted plain error, *i.e.*, that it resulted in a "miscarriage of justice." *United States* v. *Young*, 470 U.S. 1, 15 (1985). In light of the district court's repeated references both to the reasonable doubt requirement and to the government's burden on every essential element of each offense, there was clearly no miscarriage of justice in this case. See Pet. App. 3a, 19a.

Even if petitioner had raised the issue in a timely fashion, the district court's decision not to define reasonable doubt would not have been reversible error. Due process requires a trial court to instruct the jury that the government must prove its case beyond a reasonable doubt. See *Jackson* v.

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[2] The court of appeals also rejected petitioner's challenge to his sentence. Pet. App. 8a-14a.

Virginia, 443 U.S. 307, 320 n.14 (1979). See generally *In re Winship*, 397 U.S. 358 (1970). This Court has noted, however, that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." *Holland* v. *United States*, 348 U.S. 121, 140 (1954), quoting *Miles* v. *United States*, 103 U.S. 304, 312 (1880). See also *United States* v. *Ivic*, 700 F.2d 51, 69 (2d Cir. 1983); *United States* v. *Pinkney*, 551 F.2d 1241, 1244 (D.C. Cir. 1976) (describing difficulties in defining reasonable doubt). Accordingly, the overwhelming weight of recent authority holds that, as long as the trial court instructs the jury on the government's burden of proving the charges beyond a reasonable doubt, it is not required to explain reasonable doubt in its instructions. See, *e.g.*, *United States* v. *Nolasco*, 926 F.2d 869, 872-873 (9th Cir. 1991) (en banc), petition for cert. pending, No. 90-8104; *United States* v. *Ricks*, 882 F.2d 885, 894 (4th Cir. 1989), cert. denied, 110 S. Ct. 846 (1990); *United States* v. *Littlefield*, 840 F.2d 143, 146-147 (1st Cir.), cert. denied, 488 U.S. 860 (1988); *Thompson* v. *Lynaugh*, 821 F.2d 1054, 1060-1061 (5th Cir.), cert. denied, 483 U.S. 1035 (1987); *Whiteside* v. *Parke*, 705 F.2d 869, 870-873 (6th Cir.), cert. denied, 464 U.S. 843 (1983); *United States* v. *Martin-Trigona*, 684 F.2d 485, 493-494 (7th Cir. 1982). Indeed, some of these courts of appeals urge trial courts not to explain reasonable doubt in their instructions. See, *e.g.*, *United States* v. *Ricks*, 882 F.2d at 894; *United States* v. *Campbell*, 874 F.2d 838, 843 (1st Cir. 1989); *United States* v. *Hall*, 854 F.2d 1036, 1039 (7th Cir. 1988).

In light of the weight and soundness of this authority, review would not be warranted even if petitioner had raised a timely objection. This Court recently denied review in a case raising that issue, see *Seidel* v. *United States*, cert.

denied, 111 S. Ct. 1640 (1991), and there is no reason for a different disposition here.[3]

2. Petitioner also contends (Pet. 13-15) that the district court erred in failing to give a presumption of innocence instruction in its final charge to the jury. He further argues that the court of appeals erred in failing to consider the combined effect of both alleged errors in the instructions and the allegedly improper cross-examination and summation by the prosecutor. The court of appeals' review of petitioner's alleged errors, he argues, violated this Court's direction in *Kentucky* v. *Whorton*, 441 U.S. 786 (1979), and

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[3] As we explained in our opposition in *Seidel* (at 5-6), the only court of appeals decision to reverse a conviction solely because the trial court refused to define reasonable doubt is *Blatt* v. *United States*, 60 F.2d 481 (3d Cir. 1932). In this case, the court of appeals questioned the continuing validity of its *Blatt* decision and distinguished it on its facts. See Pet. App. 19a n.1. In any event, any intra-circuit conflict between *Blatt* and the decision in this case would not provide a basis for review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

Although petitioner does not cite them, two other pre-*Blatt* decisions also stated, in reversing convictions, that the trial court should have instructed on the meaning of reasonable doubt. See *Nanfito* v. *United States*, 20 F.2d 376, 378 (8th Cir. 1927); *Schencks* v. *United States*, 2 F.2d 185, 187 (D.C. Cir. 1924). As we explained in our opposition in *Seidel* (at 5-6 & n.2), however, these decisions also relied on other bases for reversal, and *Schencks* is now of questionable validity in light of the D.C. Circuit's subsequent decision in *Pinkney*. Although petitioner cites (Pet. 10) *Friedman* v. *United States*, 381 F.2d 155, 160 (8th Cir. 1967), the statement in that case is dictum. In view of the clear trend of authority in the federal courts, in which all of the recent decisions hold that a district court has no duty to explain reasonable doubt in its instructions, review of this issue would therefore not be warranted even if it had been timely raised. Petitioner also seeks to rely on decisions rejecting defendants' challenges to reasonable doubt instructions given during trial (Pet. 11); none of those decisions supports petitioner's quite different contention that the failure to give an instruction defining reasonable doubt is reversible error.

We have provided petitioner with a copy of our opposition in *Seidel*.

Taylor v. *Kentucky*, 436 U.S. 478 (1978), to consider the totality of the circumstances when reviewing alleged errors in the jury instructions.

In *Taylor* v. *Kentucky*, *supra*, the Court reversed a conviction where the district court had refused to give the defendant's requested instruction on the presumption of innocence. The Court found error in the failure to give the instruction, not because of any rule requiring that such an instruction be given in every case, but because the effect of the lack of such an instruction in the overall circumstances of that particular case combined to deny the defendant a fair trial. See *Kentucky* v. *Whorton*, 441 U.S. at 788. In that case, the overall instructions were "Spartan," the evidence was weak, and the prosecutor made improper remarks about the indictment and other statements suggesting that the defendant's guilt could be inferred from his merely having been charged. 436 U.S. at 486-488.

In *Kentucky* v. *Whorton*, *supra*, the Court made clear that a presumption of innocence instruction need not be given in every case, and that its holding in *Taylor* was based on the facts of that case. The omission of such an instruction, the Court explained, "must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial." 441 U.S. at 789.

In the instant case, unlike in both *Taylor* and *Whorton*, petitioner made no specific request for a presumption of innocence instruction in the court's final charge; he complained of the absence of the instruction for the first time on appeal. Pet. App. 4a, 20a; Gov't C.A. Br. 28-29. Looking at the totality of the circumstances in this case, the court of appeals correctly concluded that the omission of a

presumption of innocence instruction here did not amount to plain error. As the court pointed out, the district court twice gave a presumption of innocence instruction at the beginning of the trial, following the swearing of the jury. Pet. App. 21a. In its final charge, the court also gave other instructions that bolstered its previous instructions on presumption of innocence, explaining that the defendant never had the duty of introducing any evidence and that the jury must consider only the evidence presented in reaching its verdict. *Ibid.* Finally, the court of appeals noted that the evidence against the defendants was substantial. *Ibid.*

Contrary to petitioner's contention that the court of appeals failed to consider the totality of the circumstances when judging the total effect of the alleged errors in the instructions together with the claimed improprieties by the prosecutor, the court of appeals considered each factor that was relevant to its determination. While the court did not mention the prosecutor's remarks in its assessment of the jury instructions, it did consider the combined effect of the prosecutor's statements and the jury instructions in its discussion of whether prejudice resulted from the prosecutor's alleged misconduct. Pet. App. 7a. Unlike the situation in *Taylor* v. *Kentucky*, the court of appeals here found no danger that any of the remarks made by the prosecutor combined with a flaw in the jury instructions to affect the defendant's right to a fair trial. The court specifically found that the prosecutor's remarks could not have been interpreted by the jury as having any effect on the government's burden of proving guilt beyond a reasonable doubt, particularly in light of other instructions given by the court. Pet. App. 7a. The court of appeals expressly relied on *Kentucky* v. *Whorton* in its analysis of the issue concerning the presumption of innocence instruction, and stated that its

assessment was based on the totality of the circumstances. Pet. App. 20a-21a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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